NO. 48941-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

PATRICK NATHAN SHENAURLT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 15-1-04581-6

Brief of Respondent

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Table of Contents

Table of Authorities

State Cases

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion by not giving an additional instruction, where the trial court's instructions adequately explained the law and allowed the parties to argue their theories of the case, and where the failure to notify the parties of a jury question was harmless beyond a reasonable doubt?

2. Where the evidence showed that the defendant intentionally hit one of the officers in the head with his elbow, kicked another officer in the knee, and threw a bicycle at him, was sufficient evidence admitted for a reasonable jury to find that the defendant had the requisite intent to assault two law enforcement officers?

B. STATEMENT OF THE CASE.

1. Procedure

On November 17, 2015, Patrick Nathan Shenaurlt, hereinafter "defendant", was charged with two counts of third degree assault for an incident involving two police officers. CP 1-2. The case proceeded to trial on February 24, 2016. RP 3.

On March 2, 2016, the jury was instructed, heard closing arguments and began deliberating. RP 238. The following day, it submitted a written question to the court: "In instruction number 9, does the phrase 'when acting with...objective or purpose to accomplish a result that constitutes a crime' refer to any crime or the specific crime of assault

in this case?" CP 61 (emphasis in the original). The reference to instruction nine was a reference to the definition of intent. CP 57, Instruction No. 9. The court responded without notifying the parties, "You must go off the instructions as written." CP 61. The jury convicted defendant as charged. CP 99, 100; RP 244-45.

On March 11, 2016, defense counsel filed a motion to arrest judgment and/or grant a new trial based on an alleged violation of CrR 6.15(f). CP 62-67, 72-74. The State filed a response. CP 68-71. After oral argument, the court denied the defendant's motion. CP 89; RP 261, 251-265. Thereafter, the court imposed a 17 month sentence. CP 75-88; RP 273. Defendant filed a timely notice of appeal. CP 95.

2. Statement of Facts.

On November 15, 2015, Tacoma Police Officers Zack Spangler and Dean Waubanascum were working the graveyard shift in North Tacoma. RP 37[1]. At 9:54 p.m. the officers received a call about a noise disturbance at the corner of 7th and M in Tacoma. RP 38. Upon arriving at the scene the officers saw an individual, later identified as the defendant, screaming and yelling. RP 40. The officers approached the defendant and informed him there were some noise complaints and he needed to keep the volume down. RP 41. The defendant complied and began to whisper. The

[1] The Verbatim Report of Proceedings are contained in two volumes with consecutive pagination.

officers asked if the defendant was ok and if he was going to hurt himself, to which the defendant answered "no." *Id.*

Officer Waubanascum asked the defendant if he wanted to go to a hospital or mental health professional and the defendant declined. RP 41-42. He was then informed that if there was another noise complaint the defendant would be arrested. *Id.* The defendant stated he understood. RP 42. The officers ended their contact with the defendant and returned to their patrol car. RP 43.

Once the officers entered the patrol car the defendant again began to scream at the top of his lungs. RP 44. The officers exited the vehicle to arrest the defendant. *Id.* This was the beginning of a continuing course of conduct in which the defendant directed various forms of resistance and force at the officers.

Officer Waubanascum told the defendant he was under arrest and placed the defendant's right hand behind his back to handcuff him. *Id.* As this was occurring, Officer Spangler saw the defendant ball his left hand into a fist in what appeared to be a "striking" or "pre-attack indicator." *Id.* Upon noticing this, Officer Spangler grabbed the defendant's left arm around the wrist and elbow to try and force the defendant's hand behind his back to be handcuffed. RP 45.

As the officers attempted to handcuff the defendant, he began to resist. *Id.* Officer Spangler told the defendant to relax. *Id.* However, the defendant disobeyed and was able to pull his hand free of the officer's grasp. *Id.* The defendant then pulled his arm forward and threw it back at Officer Spangler's head. *Id.* The officer was struck on the left side of his face on the jawline. *Id.* Officer Spangler believed this was purposeful and directed at him because the defendant had already freed himself from the officer's grasp. RP 58. Officer Waubanascum attempted to grab ahold of the defendant. RP 157. However, the defendant kicked Officer Waubanascum in the right knee. *Id.* The impact caused the officer to stumble back. *Id.* The kick appeared purposeful and intentional to the officer. *Id.*

After Officer Spangler was hit, he staggered backwards and saw that Officer Waubanascum no longer had control over the defendant. RP 46. Officer Waubanascum then issued verbal commands to the defendant to get on the ground, which the defendant ignored. *Id.* The defendant began to run away as fast as he could. RP 161. When the defendant continued to run Officer Waubanascum deployed his Taser without effect. *Id.* The defendant then looked behind him, saw that Officer Waubanascum was pursing him, and threw a bike at the officer. *Id.* The officer believed that the defendant threw the bike at him intentionally. *Id.* The bike hit the

officer's legs. *Id.* After getting hit, Officer Waubanascum continued to pursue the defendant. RP 162.

Eventually, the officers corralled the defendant against a chain-link fence. RP 49. The defendant entered a fighting stance with both hands balled into fists up near his head. *Id.* The officers again told the defendant to get on the ground. *Id.* The defendant appeared ready to go to the ground, however he changed his mind and attempted to flee again. RP 49-50. Officer Waubanascum again attempted to subdue the defendant with his Taser and again, it had no effect. RP 164. Officer Spangler then deployed his Taser, but it seemed to get stuck in the defendant's jacket. RP 51. The defendant then turn around and was backing away from the officers with his fist balled up and facing the officers. *Id.* It appeared to the officers that the defendant's behavior was purposeful as he was in a fighting stance with his hands balled into fists. *Id.*

Eventually, Officer Waubanascum attempted to pepper spray the defendant from a distance of ten to fifteen feet. RP 167. While the pepper spray hit the defendant where it was supposed to, and at a distance where it should affect the defendant, the defendant just wiped off the pepper spray and continued to try and flee. RP 167-168. Officer Spangler however did get splashed in the face with pepper spray and was affected by it. RP 52. Because the defendant was not affected by the pepper spray,

both officers felt the defendant was likely on some sort of narcotic. RP 52, 168.

The defendant continued to flee. RP 54. The defendant eventually reached a gate to a fence which was lying on the ground and threw it at Officer Spangler, though he missed. RP 55. The defendant ran through the open gate and swung an attached gate, striking Officer Waubanascum. RP 56, 171. Officer Waubanascum was eventually able to catch up with the defendant and grab ahold of him. RP 174. The officer attempted to subdue the defendant. *Id.* However, the defendant threw a punch at the officer, which he was able to avoid. RP 174-175. Officer Spangler then struck the defendant on the leg with his collapsible baton. RP 56.

Officer Wendy Haddow Brunk, also of the Tacoma Police Department arrived on the scene during this latest attempt to subdue the defendant. RP 57, 116. Officer Haddow Brunk[2] attempted to use her Taser on the defendant as well. RP 117. The Taser again did not have an effect. *Id.* The defendant then grabbed the front of Officer Haddow Brunk's uniform and attempted to pull her towards him. *Id.* At that point, Officers

[2] Upon being sworn in the officer stated her last name was "Haddow Brunk." Throughout testimony, the other officers refer to her at various times as "Haddow," "Brunk," and "Haddow Brunk." For the sake of consistency this brief will refer to the officer as "Haddow Brunk."

Spangler and Waubanascum were able to grab the defendant and take him down to the ground. *Id.*

Once the defendant was on the ground, the three officers were able to handcuff the defendant, although his arms and legs were flailing. RP 118. After the defendant was detained, Tacoma Fire arrived and the defendant was transported by Officer Haddow Brunk to Tacoma General. RP 59. Eventually, the defendant was cleared to leave the hospital. RP 60. Officers Spangler and Waubanascum escorted the defendant to the jail at 3:20 A.M. *Id.* During transport to the jail, the defendant was calm, did not shout, and did not make any odd statements. *Id.* The jail did not reject the defendant for medical or health reasons. RP 62. As such, the defendant was booked into jail. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT GIVING AN ADDITIONAL INSTRUCTION AND THEREFORE ANY ERROR RESULTING FROM THE COURT NOT INFORMING THE PARTIES PRIOR TO ANSWERING A JURY QUESTION WAS HARMLESS.

Jury instructions are sufficient if they properly inform the jury of applicable case law without misleading the jury and if they permit each party to argue its theory of the case. ***State v. Hathaway***, 161 Wn. App. 634, 647, 251 P.3d 253 (2011). When a trial court has adequately and properly instructed a jury on an issue, it may refuse other instructions

which would result in repetition, redundancy, and confusion. ***State v. Hicks***, 75 Wn.2d 73, 448 P.2d 930 (1968). Granting a motion to further instruct the jury after it has retired lies within the discretion of the trial court. ***State v. Studebaker***, 67 Wn.2d 980, 987, 410 P.2d 913 (1966).

It is not error for a trial court to refuse to give specific instructions when more general instructions adequately explain the law and allow each party to argue its theory of the case. ***State v. Castle***, 86 Wn. App. 48, 62, 935 P.2d 656 (1997) (disapproved of on other grounds). Specific instructions should not be given when general instructions adequately explain the law and the parties are able to argue their theories of the case. ***State v. Russell***, 33 Wn. App. 579, 588, 657 P.2d 338, *reversed in part* (on other grounds) 101 Wn.2d 349, 678 P.2d 332 (1983).

A party may not request an instruction and later complain on appeal that the requested instruction was given. ***City of Seattle v. Patu***, 147 Wn.2d 717, 721, 58 P.3d 273 (2002). In this case the defense agreed to the instructions adopted by the trial court. RP 192-198. It was only after the verdict was accepted and the jury was discharged, at the motion to arrest the judgment four weeks later, that the defense argued for an additional instruction concerning intent. RP 244-251.

a. The jury instructions as given were proper and therefore the court's response to the jury question was likewise proper.

The defendant now argues that reversal is required because the trial court could have given an additional instruction concerning the definition of intent if the parties had been notified of the jury question. In the trial court the defendant argued specifically that the court should have given an additional instruction on the definition of intent as to one of the two counts, the count for Officer Spangler. RP 252. Thus, the defendant's proposition is that in place of the clear, statutorily consistent definition of intent the court should have given an instruction sure to cause confusion and prejudice since it would have changed the definition of intent after closing arguments and as to only one of the assault counts. How could the court properly instruct the jury that intent as to one of the assault counts was different than the other?

There was no prejudice and no error in the court's response. The only error was not in giving prior notice. But as to what the jury was instructed, the court's solution was correct and the defense after-the-fact proposal was not.

Intent is defined in terms of the character of the defendant's acts. It applies throughout the criminal code and not with respect to a particular crime. Under RCW 9A.08.010(1)(a) there is no requirement that a

defendant intend to commit a particular crime as the defendant suggests. Rather the defendant's must "act with the objective or purpose to accomplish a result which constitutes a crime." *Id.* That is, whatever acts the defendant does that may constitute a crime, must have been purposeful and objective-driven. It would have been error to instruct the jury, as the defendant proposed, that with respect to the assault on Officer Spangler, intent meant that the defendant must have had the intent to commit the specific crime of third degree assault. RP 252.

Instruction 9 was drawn from the language from the statute. CP 45-60. The State was not required to prove that the defendant intended to commit the crime of third degree assault. Rather, the State only had to prove that the defendant acted with an objective or purpose. Put another way, the State was not required to prove that the defendant intended to commit the crime of assault in the third degree but rather that his actions were intentional.

The jury instructions originally given were proper and the defendant does not argue otherwise. The trial court acted within its discretion in its response to the jury question and subsequently in denying the defendant's motion to arrest the judgment.

b. Any error resulting from the court not consulting with the parties prior to answering a jury question was harmless as the court's answer was neutral and correct.

A criminal defendant has a constitutional right to be present at all critical stages of the proceedings. ***State v. Pruitt***, 145 Wn. App. 784, 798, 187 P.3d 326 (2008); ***State v. Ratliff***, 121 Wn. App. 642, 646, 90 P.3d 79 (2004). A critical stage is one "where the defendant's presence has a reasonably substantial relationship to the fullness of his or her opportunity to defend against the charge." ***State v. Jasper***, 158 Wn. App. 518, 539, 245 P.3d 228 (2010), *aff'd*, 174 Wn.2d 96, 271 P.3d 876 (2012). Generally, conferences between the court and counsel on legal matters are not critical stages except when the issues raised involve disputed facts. ***In re Pers. Restraint of Lord***, 123 Wn.2d 296, 306, 868 P.2d 835, *cert. denied*, 513 U.S. 849 (1994).

Regarding jury questions during deliberations, the criminal rules provide:

> The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing...Any

> additional instruction upon any point of law shall be given in writing.
> CrR 6.15(f)(1).

Defendant argues that the trial court committed reversible error in responding to the jury question without first notifying the parties of the inquiry and allowing them an opportunity to comment on any response. Brief of Appellant at 4-5. Although the trial court did not notify the parties before it responded, the defendant has not shown that he is entitled to relief because any potential error was harmless beyond a reasonable doubt.

A court should "communicate with a deliberating jury only with all counsel and the trial judge present. ***State v. Russell***, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980). "Any communication between the court and the jury in the absence of the defendant [or defense counsel] is error." ***Jasper***, 158 Wn. App. at 541 (quoting ***State v. Langdon***, 42 Wn. App. 715, 717, 713 P.2d 120, *review denied*, 105 Wn.2d 1013 (1986)). However, a court's error in answering jury questions in the defendant's absence may be harmless if the State can show harmlessness beyond a reasonable doubt. ***State v. Caliguri***, 99 Wn.2d 501, 509, 664 P.2d 466 (1983); ***State v. Allen***, 50 Wn. App. 412, 419, 749 P.2d 702, *review denied*, 110 Wn.2d 1024 (1988). If the court's answer to a jury question is "negative in nature and conveys no affirmative information," then the

defendant suffers no prejudice and the error is harmless. ***Russell***, 25 Wn. App. at 948.

In ***State v. Langdon***, the trial court instructed the jury on the elements of first and second degree robbery, accomplice liability, and theft. ***Langdon***, 42 Wn. App. at 717. During deliberations, the jury sent a note to the court asking, "Does 'committing' mean aid in escaping?" *Id.* at 717 (internal quotation marks omitted). The judge, without consulting with counsel, responded, "You are bound by those instructions already given to you." *Id.* at 717 (internal quotation marks omitted). The jury returned a guilty verdict after further deliberations. *Id.* Langdon argued on appeal that this communication violated CrR 6.15(f)(1) and his right to be present at all stages of the proceedings. *Id.* The court disagreed and found that any error was harmless, because the communication was "neutral, simply referring the jury back to the previous instructions." *Id.* at 717-18.

In ***State v. Jasper***, 158 Wn. App. 518, 539, 245 P.3d 228 (2010), *aff'd*, 174 Wn.2d 96, 271 P.3d 876 (2012), the defendant was charged with felony hit-and-run and driving while license suspended or revoked in the third degree. ***Jasper***, 158 Wn. App. at 524. During deliberations, the jury submitted two questions to the court. *Id.* at 525. Without notifying or consulting with counsel, the trial court responded to both questions by

telling the jury, "Please re-read your instructions and continue deliberating. No further instructions will be given to this question." *Id.* at 525-26 (internal quotation marks omitted). The ***Jasper*** court reasoned:

> The trial court erred by not informing the parties of the jury's inquiry and by not providing Jasper's counsel with an opportunity to participate in developing an appropriate response. But this error was harmless. The trial court's reply was not erroneous. The trial court's response was neutral, did not convey any affirmative information, and did not communicate to the jury any information that was harmful to Jasper. Moreover, the trial court could not have further instructed the jury on a new defense theory because the parties had not had an opportunity to address that theory in closing arguments.[3] Therefore, Jasper was in no way prejudiced by the trial court's error. The State has satisfied its burden of proving that the trial court's error was harmless.

Jasper, 158 Wn. App. at 543.

Here, the trial court erred in much the same way as the trial court in ***Jasper,*** but likewise provided the correct response to the jury. The trial court's response directed the jurors to refer back to the instructions as written. CP 61. The trial court's response was neutral like the responses in ***Langdon*** and ***Jasper***. No prejudice resulted from the trial court's

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[3] The ***Jasper*** court noted that a trial court has the discretion to provide additional instructions on the law during jury deliberations, but "'such supplemental instructions should not go beyond matters that either had been, or could have been, argued to the jury.'" ***Jasper***, 158 Wn. App. at 542 (quoting ***State v. Ransom***, 56 Wn. App. 712, 714, 785 P.2d 469 (1990)).

response. Any potential error is therefore harmless beyond a reasonable doubt.

During the colloquy on the motion to arrest judgment, the trial court indicated that even if counsel had been informed of the jury's question, the court's response would have been the same. The court stated, "[The jury was] looking for an answer outside of what the instructions, themselves, contain. It's harmless error because those are their instructions. All they can do is go off the instructions as written and read them as a whole...the Court couldn't have granted [defense counsel's proposal] because it would have required the Court to instruct them on something that was not presented to them in a court of law and that is not part of the instructions of the law. That's the way the instruction is worded is 'a crime'...anything that would differ from what they already had back in there, the Court's not going to do that; and there isn't anything you could do. They have to go off those instructions as they're read to them in open court." RP 264-65. *See also*, CP 89.

The intent instruction is not challenged on appeal and was not challenged below. Any confusion by the jury, temporary or otherwise, inheres in the verdict. ***State v. Ng***, 110 Wn.2d 32, 43, 750 P.2d 632, 638 (1988) ("The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict."), citing ***State v. Crowell,*** 92 Wash.2d 143, 594 P.2d 905 (1979),

State v. McKenzie, 56 Wash.2d 897, 355 P.2d 834 (1960), and ***Gardner v. Malone,*** 60 Wash.2d 836, 376 P.2d 651 (1962). Both the State and defendant proposed the same jury instruction regarding the definition of intent, WPIC 10.01. CP 10-29, 30-42. *See also*, RP 110, 192-198. They also presented closing arguments based on that instruction. The trial court gave the intent instruction as proposed by the parties. CP 45-60 (Instruction No. 9); RP 205. Any argument regarding the adequacy of that instruction is therefore not before this Court. RAP 2.5(a), 10.3(g).

2. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT HAD THE REQUISITE INTENT TO COMMIT ASSAULT.

Due process requires that the State prove each element of each crime beyond a reasonable doubt. ***State v. Cantu,*** 156 Wn.2d 819, 829, 132 P.3d 725 (2006) *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Thus, sufficient evidence supports a conviction when, viewing the evidence in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a

reasonable doubt. ***State v. Cannon***, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing* ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. *Id.*; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing* ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court said "[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness'

demeanor and to judge his veracity." ***State v. Cord***, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In order to prove third degree assault, the State was required to show that the defendant committed an intentional touching or striking of a law enforcement official. RCW 9A.36.031. Assault in and of itself is not a strict liability crime, but rather the mens rea of assault is the intent to commit a battery. ***State v. Brown***, 94 Wn. App. 327, 342, 972 P.2d 112 (1999). Intent is defined as acting with the objective or purpose to accomplish a result which constitutes a crime. *Id.* at 335.

Whenever intent is an element of a crime, it may be challenged by competent evidence of mental disorder resulting in an inability to form the requisite intent to commit a crime. ***State v. Thamert***, 45 Wn. App. 143, 146, 723 P.2d 1204 (1986). The lack of specific intent may not be inferred from evidence of a mental disorder. ***State v. Harper***, 64 Wn. App. 283, 288, 823 P.2d 1137 (1992). It is insufficient to provide only conclusory testimony that a mental disorder caused an inability to form specific intent. *Id.* Additionally, a person can be intoxicated and still be able to form the requisite intent to commit a crime. ***State v. Thomas***, 123 Wn. App. 771, 780-781, 98 P.3d 1258 (2004).

Here it was within the jury's prerogative to determine that even if some of the defendant's actions seemed bizarre, he nevertheless acted purposefully and with an objective. Officer Spangler testified the defendant balled his left hand into a fist. RP 44. Based upon the officer's experience and training he saw this as a "striking" or "pre-attack indicator." *Id.* It can be inferred from this alone that the defendant was acting with a purpose or objective to strike the officer with his fist. Furthermore, after the defendant had ripped his hand free from the officer's grasp, he pulled his arm forward and threw it back at Officer Spangler's head, making contact. RP 45. Again his act was purposeful and done with an objective. The officer testified directly that this was a purposeful hit directed at him. RP 58. There would have been no reason other than to assault the officer for the defendant to throw his arm back as it was already free of the officer's grasp. *Id.*

Officer Waubanascum testified the defendant was looking directly at him when the defendant kicked him in the knee. RP 157. The officer believed the kick to the knee was intentional. RP 159-160. As the defendant was fleeing from the scene, he looked behind him to see if he was being chased. RP 161. After seeing Officer Waubanascum in pursuit the defendant grabbed a bicycle and threw it at the officer, striking him in the leg. *Id.* Again, the officer believed the defendant threw the bicycle at

him intentionally. RP 162. Each of these actions were purposeful and objective-driven.

When the officers continued to chase the defendant, they saw him enter a fighting stance. RP 51. Based upon the defendant's behavior the officers saw this as "purposeful." *Id.* Additionally, the defendant was no longer saying anything unusual or odd. *Id.*

The testimony of the two officers demonstrated that each time he acted, the defendant did so with a purpose and an objective. The defendant's actions were a deliberate attempt to harm the officers, incident to, and in support of, his escape effort.

For the first time on appeal, the defendant argues that he did not have the requisite intent to commit assault due to diminished capacity. The defendant never asked for a jury instruction on diminished capacity or voluntary intoxication. CP 30-42. He also failed to object to a lack of such an instruction. RP 192-98. Although questions were asked of both officers regarding the defendant's bizarre behavior, at no time did the defendant have an expert testify that the defendant was not mentally competent to

form the requisite intent. Furthermore, there was no indication from the hospital report that on the night of the incident the defendant was intoxicated or under the influence of drugs.

The questions asked of the officers were insufficient to raise a diminished capacity defense. "To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." ***State v. Atsbeha***, 142 Wn.2d 904, 914, 16 P.3d 626, 631–32 (2001). The evidence in this case did not meet this standard. Even if one were to assume that the defendant's bizarre behavior was caused by a mental disorder, there is no evidence that the disorder impaired his ability to act with a purpose and an objective. Goal directed acts, such as the defendant's acts in support of his escape attempt, are the very definition of intentional acts. Thus, the jury properly found that the defendant was able to, and did form intent to, commit assault.

D. CONCLUSION.

For the foregoing reasons the State urges the Court to affirm the defendant's conviction and sentence.

DATED: Tuesday, December 13, 2016

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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